

In The
Supreme Court of the United States
October Term, 1978

No. 78-381

CLARENCE H. HOLDING,
Appellant,
v.
BVA CREDIT CORPORATION,
Appellee.

MOTION TO DISMISS

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BVA CREDIT CORPORATION,

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PRELIMINARY STATEMENT

Appellee, BVA Credit Corporation, in accordance with the provisions of Rule 16 of the Supreme Court Rules, moves this Court to dismiss the appeal of Clarence H. Holding and files this brief in support thereof.

GROUND S OF MOTION

- I. The Appeal Is Not Within The Jurisdiction Of This Court.
- II. The Appeal Does Not Present A Substantial Federal Question On Appellant's Sixth Amendment Argument Because The Sixth Amendment Is Applicable Only To Criminal Proceedings.
- III. The Jurisdictional Statement Is Defective In A Number Of Respects.

STATEMENT OF THE CASE

The Jurisdictional Statement is a muddled, disjointed, incomprehensible recitation of factual allegations which bears no resemblance to the requirements of Rule 15 of the Rules of the Supreme Court. One thing is clear: appellant's grievance is the result of having lost a piece of commercial realty through foreclosure by appellee. The questions appellant seeks to present to this Court are less clear, but essentially are these: (1) whether the alleged failure of the Deputy Clerk of the Circuit Court of the City of Richmond to serve subpoenas of appellant violates appellant's rights guaranteed by the Sixth Amendment; and (2) whether the foreclosure sale was a deprivation of property without due process of law prohibited by the Fourteenth Amendment.

The material facts are undisputed.

David M. Shaw, the substitute trustee, under a deed of trust securing a note made by appellant and held by appellee, sold appellant's property at a public foreclosure sale to appellee, the high bidder. Following the foreclosure sale there was a deficiency due on the note of \$12,130.89 plus interest and attorney's fees. On February 17, 1976, appellee instituted suit in the Circuit Court of the City of Richmond, Division I against appellant to recover the deficiency due on the note held by appellee. Trial was set for December 13, 1976 with a jury. On or about October 5, 1976, appellant filed a counterclaim against appellee seeking \$10,150,000 in exemplary damages and \$10,000,000 in punitive damages together with interest, attorneys' fees* and costs. Appellee filed a motion for summary judgment on the counterclaim based upon appellant's answers to its request for admissions. Ruling in favor of appellee, the trial court stated:

* Appellant has appeared *pro se* since the inception of this action.

It appearing to the Court that the following facts are undisputed. By deed of trust note (the Note) dated July 6, 1973, the defendant [appellant herein] obligated himself to Hanover Mortgage Corporation (Hanover), of which BVA [appellee herein] is the successor by merger, in the amount of \$25,150.00. As security for this debt, the defendant gave a deed of trust (the Deed of Trust) on certain real property (The Real Property) located at the intersection of Maple and Robinson Streets in Ashland, Virginia. By the terms of the Note the defendant was to make consecutive monthly installment payments to Hanover in the amount of \$351.41, payable on the sixth day of each month, until the note was paid in full. The defendant's last payment on the Note was made on July 14, 1975 for the installment due July 6, 1975.

By letter dated October 28, 1975, BVA as holder of the Note made demand on the defendant for payment of the amount then in arrears, \$22,338.00 plus interest and late charges. This letter was mailed to the defendant by certified mail on October 29, 1975, addressed to the defendant at Post Office Box 1873, Richmond, Virginia 23215.

BVA received no response from the defendant to its October 28, letter. By letter (the Notice of Foreclosure Letter) dated December 9, 1975, David M. Shaw as substitute trustee notified the defendant that BVA had accelerated the entire indebtedness evidenced by the Note and that a foreclosure sale (the Foreclosure Sale) by public auction of the Real Property would be held on December 23, 1975 at 9:00 a.m. The Notice of Foreclosure Letter, along with a copy of the legal advertisement (the Advertisement) was mailed by registered mail on December 9, 1975, addressed to the defendant at Post Office Box 1873, Richmond, Virginia 23215, the last known address of the defendant as such address then appeared on the records of BVA.

The Advertisement was published in the Richmond Times-Dispatch [a morning newspaper] on December 19, 20, 21, 22 and 23, 1975. The Deed of Trust required that the Foreclosure Sale be held after first advertising it five times.

The defendant has made many allegations in his Counterclaim but reduced to their essence he claims that: (1) BVA failed to make demand upon the defendant for payment of the Note; (2) BVA failed to give the defendant notice of foreclosure and failed properly to advertise foreclosure; (3) BVA failed to conduct the Foreclosure Sale on December 23, 1975; and (4) BVA sold the Real Property at a time that was unpropitious and for a price which was wholly inadequate.

Order of Circuit Court of the City of Richmond, Division I, dated December 16, 1976 attached hereto as Exhibit 1.

The trial court, based upon the admissions of appellant, concluded that under Virginia law and the terms of the note and deed of trust, appellee made proper demand upon appellant, that appellee gave appellant notice of the foreclosure sale and that appellee properly advertised the foreclosure sale. Accordingly, appellee was granted summary judgment on all the allegations of appellant's counterclaim except the allegation that the foreclosure sale was "not conducted without fraud" and the question of the reasonableness of the price paid for the foreclosed property. A jury was impaneled to hear the case and at the conclusion of the evidence, the trial court granted appellee's motion to strike appellant's evidence on his counterclaim and entered summary judgment for appellee on its claim. A copy of this order is attached as Exhibit 2.

After entry of judgment for appellee, appellant moved

for a new trial on the grounds that he had witnesses and evidence to present which he had been unable to present because the Deputy Clerk had not issued summonses. The trial court, after allowing appellant to vouch the record as to the nature of the evidence, held that the evidence was "insufficient as a matter of law to warrant the granting of a new trial as the evidence sought to be brought forward by the defendant [appellant] in a new trial would not qualify as newly-discovered evidence." Order of the Circuit Court of the City of Richmond, Division I dated January 4, 1977, attached hereto as Exhibit 3.

Appellant's motion for a new trial was denied, and he filed his notice of appeal and assignments of error to the Supreme Court of Virginia. Appellant assigned as error the failure of the trial court to grant him a new trial on grounds that he was unable to summons evidence or witnesses. However, the assignments of error do not contain any reference whatsoever to the Sixth Amendment or to appellant's allegation that he has been deprived of property without due process of law. The only issues considered by the trial court were whether there was any fraud in connection with the foreclosure sale and whether the price obtained at the foreclosure sale was reasonable. Appellant had admitted the deficiency and his allegation concerning demand and notice of foreclosure had been previously ruled on. The trial court found that appellant did not put on sufficient evidence of fraud or of the unreasonableness of the price to allow either issue to go to the jury and therefore struck appellant's evidence on his counterclaim and entered judgment for appellee for the deficiency on the note. The Supreme Court of Virginia not finding any reversible error refused to grant appellant's petition for appeal.

ARGUMENT

I.

The Appeal Is Not Within The Jurisdiction Of This Court.

A. The Jurisdictional Statement does not identify or allege any statute of the Commonwealth of Virginia that is repugnant to the Constitution, treaties or laws of the United States.

Final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by this Court by appeal where the validity of a statute is questioned on the grounds that it is repugnant to the Constitution, treaties or laws of the United States and the state court's decision is in favor of its validity. 28 U.S.C. § 1257(2). Appellant's Jurisdictional Statement does not identify or even allege that any statute of the Commonwealth of Virginia is repugnant to the Constitution, treaties or laws of the United States. Thus, this Court lacks jurisdiction to hear this appeal.

B. Appellant's Sixth and Fourteenth Amendment claims are not within the jurisdiction of this Court because they were not presented to the court below.

The federal question sought to be presented in this case is whether the appellant has been denied rights under the Sixth and Fourteenth Amendments to the Constitution. This Court has

[R]epeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdic-

tion but that its decisions of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206, 212-213 (1938).

No federal question was presented to the trial court. Appellant assigned as error to the Supreme Court of Virginia the denial of his motion for a new trial on grounds that he had been unable to summons evidence or witnesses. Two sound reasons existed under state law for denying appellant's motion for a new trial. First, if the motion is predicated on newly discovered evidence, it must appear that the evidence if presented at a new trial ought to change the results on the merits. *Roundtree v. Roundtree*, 200 Va. 57, 104 S.E.2d 42 (1958). The trial court found that appellant's evidence did not so qualify. Second, if the motion is predicated on misconduct of the Deputy Clerk, a party waives his right to a new trial if, after discovering an act of misconduct which might entitle him to a new trial, he remains silent on the chance of securing a favorable decision and then if unfavorable, makes a motion for a new trial. *Hinton v. Gallagher*, 190 Va. 421, 57 S.E.2d 131 (1950). Appellant knew prior to trial that his requested summonses had not been served, yet he chose to wait until after trial and judgment to bring this to the trial court's attention by motion for a new trial.

Appellant's contention that he has been deprived of his property without due process of law is presented for the first time in this appeal. Based upon facts established by the answers to request for admissions, the trial court ruled that appellee had complied with the laws of the Commonwealth

of Virginia in giving notice, advertising and conducting the foreclosure sale.

Two issues were thus litigated: appellant's allegation that the foreclosure sale was fraudulent and the unreasonableness of the price obtained at the foreclosure sale. The trial court found that appellant had not presented sufficient evidence to support either allegation and struck both. The Supreme Court of Virginia in reviewing the record of the trial court found no reversible error. There simply was no federal question before the trial court or the Supreme Court of Virginia.

II.

The Appeal Does Not Present A Substantial Federal Question On Appellant's Sixth Amendment Argument Because The Sixth Amendment Is Applicable Only To Criminal Proceedings.

Appellant's argument that he has been denied his Sixth Amendment right because the Deputy Clerk of the trial court failed to issue subpoenas requested by him is fatally defective because the Sixth Amendment deals only with criminal proceedings rather than civil actions such as this. *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960); *U.S. v. Zucker*, 161 U.S. 475, 480-81 (1890).

III.

The Jurisdictional Statement Is Defective In A Number Of Respects.

A. Appellant's Jurisdictional Statement does not contain a concise statement of the grounds on which the jurisdiction of this Court is invoked, including the statutory provisions believed to confer jurisdiction on this Court and the cases sustaining jurisdiction. Rule 15(1)(b).

B. Appellant has failed even to identify, much less set out verbatim, the text of the statutes of Virginia whose validity is in question in this appeal. Rule 15(1)(b)(v).

C. The Jurisdictional Statement utterly fails to provide a concise statement of the case containing the facts material to the consideration of the question presented. Rule 15(1)(d).

D. Appellant has failed to specify the stage in the proceedings in either the trial court or the appellate court at which and the manner in which, the purported federal questions sought to be reviewed were first raised, the method of raising them and the way they were passed on by the court. Rule 15(1)(d).

E. Appellant has failed to quote or summarize the pertinent portions of the record to support his assertion that the rulings of the lower courts were of a nature to bring the case within a statutory provision conferring jurisdiction on this Court. Rule 15(1)(d).

F. Appellant has failed to include a presentation of the grounds upon which he contends that the federal questions are substantial, showing that the nature of the case and the rulings of the lower courts are such as to bring the case within the jurisdiction of this Court. Rule 15(1)(e).

G. Appellant has failed to include the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution. Rule 15(1)(e).

H. Appellant has failed to append to his Jurisdictional Statement a copy of the order and opinion of the Circuit Court of the City of Richmond. Rule 15(1)(h).

I. Appellant has failed to append to his Jurisdictional Statement a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed. Rule 15(1)(j).

CONCLUSION

For all the foregoing reasons, appellee, BVA Credit Corporation respectfully prays that this Court dismiss appellant's appeal.

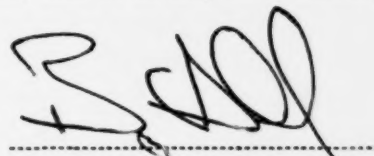
Respectfully submitted,

BVA Credit Corporation
By Counsel

BENJAMIN C. ACKERLY
JOHN A. LUCAS
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

CERTIFICATE

I certify that I have mailed three copies of the foregoing Motion to Dismiss to Clarence H. Holding, 1901 Woodbine Road, Richmond, Virginia 23225, this 17th day of October, 1978.



BENJAMIN C. ACKERLY

APPENDIX

EXHIBIT 1

Virginia:

December 16, 1976

In The
CIRCUIT COURT OF THE CITY OF RICHMOND

Division I

Law No. 9221

BVA Credit Corporation,

Plaintiff,

v.

Clarence H. Holding,

Defendant.

ORDER

This matter came on before the Court for hearing on November 24, 1976 upon the Motion for Summary Judgment of BVA Credit Corporation (BVA) on the Counterclaim of defendant Clarence H. Holding, upon the defendant's answers to BVA's Request For Admissions and Second Request For Admissions, upon argument of the defendant pro se and BVA, by counsel, and upon a memorandum of law filed by BVA.

It appearing to the Court that the following facts are undisputed. By a deed of trust note (the Note) dated July 6, 1973, the defendant obligated himself to Hanover Mortgage Corporation (Hanover), of which BVA is the successor by merger, in the amount of \$25,150.00. As security for this debt, the defendant gave a deed of trust (the Deed

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of Trust) on certain real property (the Real Property) located at the intersection of Maple and Robinson Streets in Ashland, Virginia. By the terms of the Note, the defendant was to make consecutive monthly installment payments to Hanover in the amount of \$351.41, payable on the sixth day of each month, until the Note was paid in full. The defendant's last payment on the Note was made on July 14, 1975 for the installment due July 6, 1975.

By letter dated October 28, 1975, BVA as holder of the Note made demand on the defendant for payment of the amount then in arrears, \$22,338.00 plus interest and late charges. This letter was mailed to the defendant by certified mail on October 29, 1975, addressed to the defendant at Post Office Box 1873, Richmond, Virginia 23215.

BVA received no response from the defendant to its October 28, letter. By letter (the Notice of Foreclosure Letter) dated December 9, 1975, David M. Shaw as substitute trustee notified the defendant that BVA had accelerated the entire indebtedness evidenced by the Note and that a foreclosure sale (the Foreclosure Sale) by public auction of the Real Property would be held on December 23, 1975 at 9:00 a.m. The Notice of Foreclosure Letter, along with a copy of the legal advertisement (the Advertisement) was mailed by registered mail on December 9, 1975, addressed to the defendant at Post Office Box 1873, Richmond, Virginia 23215, the last known address of the defendant as such address then appeared on the records of BVA.

The Advertisement was published in the Richmond Times-Dispatch on December 19, 20, 21, 22 and 23, 1975. The Deed of Trust required that the Foreclosure Sale be held after first advertising it five times.

The defendant has made many allegations in his Counterclaim but reduced to their essence he claims that: (1) BVA

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failed to make demand upon the defendant for payment of the Note; (2) BVA failed to give the defendant notice of foreclosure and failed properly to advertise foreclosure; (3) BVA failed to conduct the foreclosure sale on December 23, 1975; and (4) BVA sold the Real Property at a time that was unpropitious and for a price which was wholly inadequate.

The defendant may not recover for BVA's alleged failure to make demand for payment of the Note since the defendant waived demand in the Note and, in any event, the evidence is undisputed that BVA made demand upon the defendant by its letter of October 28, 1975.

With respect to the notice of foreclosure defendant has admitted the genuineness of BVA's ledger card on defendant's account. This ledger card states that the defendant's address is Post Office Box 1873, Richmond, Virginia 23215. By Answer 2 to BVA's Second Request for Admissions, the defendant admitted that he received a letter sent by BVA to him, dated April 4, 1975, and addressed to Post Office Box 1873, Richmond, Virginia 23215. By Answers 12, 13, 14, 15, 16 and 17 of BVA's Second Request, the defendant admitted that the Notice of Foreclosure Letter was forwarded to a mailing address which was at the time a current mailing address of his.

Accordingly, the facts make clear that, as a matter of law, the Notice of Foreclosure Letter was mailed to the defendant at his last known address as such address appeared on the records of BVA.

Concerning the sufficiency of BVA's advertisement, Virginia Code § 55-63(a) states that:

"Whenever any deed of trust to secure debts . . . contains a provision requiring the giving of notice of sale thereunder for a specified number of days by advertise-

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ment in one or more newspapers . . . [t]he last publication may be on the day of sale, if the publication be in a newspaper a principal daily edition of which is delivered or publicly sold before the time fixed for such sale."

By Answer 19 to BVA's Second Request, the defendant admitted that the Advertisement was published in the Richmond Times-Dispatch, a morning newspaper, on December 19, 20, 21, 22 and 23, 1975. The Deed of Trust required merely that the Advertisement be published five times prior to sale.

Consequently, the Foreclosure Sale was advertised in accordance with the requirements of the Deed of Trust.

With respect to the time of the Foreclosure Sale, the Court finds as a matter of law that BVA was entitled to conduct the Foreclosure Sale on December 23, 1975, a regular business day.

Further, the defendant, having alleged fraud in connection with the foreclosure, he may attack [sic] the reasonableness of the price paid for the Real Property at the Foreclosure Sale.

Accordingly, BVA is hereby granted summary judgment on the counterclaim of the defendant with respect to all the allegations therein, save and except the defendant's allegations that the foreclosure was not conducted without fraud and on December 23, 1975.

A Copy,

Teste: Edward G. Kidd, Clerk

By Gerald M. Grosshns, D.C.

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EXHIBIT 2

Virginia:

December 23, 1976

In The
CIRCUIT COURT OF THE CITY OF RICHMOND

Division 1

BVA Credit Corp.,

Plaintiff,

v.

Clarence H. Holding,

Defendant.

ORDER

This case came on December 13, 1976, for trial on the merits of plaintiff's claim in chief and the defendant's counter-claim on the specific issue only as to alleged fraud in connection with the foreclosure and the reasonableness of the price paid for the real property which was the subject of the foreclosure, and the plaintiff came with its attorney, and the defendant came, in person, without counsel, and thereupon came a jury, to-wit: Darrell H. Bugg, George Clarke, Joyce M. Foster, Richard W. Foster, John J. Fox, Jr., Richard H. Green, William H. Simms and Thomas W. Towne, who were sworn well and truly to try the issues joined in this case, and the true verdict give according to the evidence and the law.

The evidence of the plaintiff and defendant was presented and at the conclusion thereof, motion of plaintiff to

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strike the evidence of the defendant on its counter-claim and to render summary judgment for the plaintiff on its claim on grounds stated in the record, the Court doth sustain the motion of the plaintiff to strike the defendant's evidence on its counter-claim and doth enter summary judgment in plaintiff's favor, and the jury is therefore discharged from further consideration of this matter.

It is ORDERED by the Court that the plaintiff recover of the defendant the sum of Twelve Thousand One Hundred Thirty-One Dollars and Eighty-One Cents with interest thereon to be computed at the rate of eight per centum per annum from December 23, 1975, until paid, its costs expended in this matter, and plaintiff's attorney fees in the amount of Three Thousand Thirty-Two Dollars and Ninety-Five Cents.

The Court further notes for the record that in open court on the day of the trial herein, the defendant was informed when he mentioned that he desired a new trial that if he desired a new trial, he would have to timely initiate a motion for a new trial in accordance with applicable law and the Rules of the Supreme Court of Virginia.

To all of which action of the Court, the Court notes an exception on behalf of the defendant.

A copy of this Order is to be mailed to Clarence H. Holding at 1901 Woodbine Road, Richmond, Virginia 23225, and to Benjamin Ackerly, Esquire, counsel for the plaintiff.

A Copy,

Teste: Edward G. Kidd, Clerk

By Audry Maxim, D.C.

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EXHIBIT 3

Virginia:

January 4, 1977

In The

CIRCUIT COURT OF THE CITY OF RICHMOND

Division 1

BVA Credit Corporation,

Plaintiff,

v.

Clarence H. Holding,

Defendant.

ORDER

THIS CAUSE came on today's date on the defendant's motion to vacate this Court's judgment announced in open Court on December 13, 1976, and memorialized in its written Order entered on December 23, 1976, on the ground that the Court had granted the defendant a new trial at the conclusion of the trial held on December 13, 1976, and the matter was argued.

Upon Due Consideration, its ORDERED and DECREED, and the Court finds, that although the defendant made a verbal motion for a new trial at the conclusion of the trial on the merits held on December 13, 1976, no grounds for a new trial were stated; the Court did not grant a new trial, however, the defendant was instructed by the Court that if he desired a new trial he should file a proper motion for a new trial alleging proper grounds within the time provided by

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the Rules of Court and that such motion would then be timely considered; that no motion for a new trial was ever filed until the defendant's present motion to vacate the Court's judgment of December 13, 1976. The Court after allowing the defendant to vouch the record as to his ground for a new trial finds that such allegations are insufficient as a matter of law to warrant the granting of a new trial as the evidence sought to be brought forward by the defendant in a new trial would not qualify as newly-discovered evidence.

It is therefore ORDERED and DECREED that the defendant's motion to vacate the Court's Judgment of December 13, 1976, and the Order of December 23, 1976, is denied, and the defendant's exception is duly noted.

A copy of this Order is to be mailed to counsel for the plaintiff and to the defendant and the date of mailing the same duly noted on the margin hereof and the parties billed accordingly.

A Copy,

Teste: Edward G. Kidd, Clerk

By Audry Maxim, D.C.